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No. 82-2126

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARRIOTT IN-FLITE SERVICES, ETC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by failing to bargain in good faith with the Union, by making unilateral changes in the employees' terms and conditions of employment, by originating and sponsoring circulation of decertification petitions, and by withdrawing recognition from the Union.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-5a) is not reported. The decisions and orders of the National Labor Relations Board (Pet. App. 6a-91a) are reported at 263 N.L.R.B. No. 137, 259 N.L.R.B. 157, and 258 N.L.R.B. 755, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1983 (Pet. App. 3a-5a). A petition for rehearing was denied on May 2, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Certain provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 105a-106a). Other relevant provisions include Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)), which states in pertinent part:

> Section 8(a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, * * *.

STATEMENT

1. The facts are set out in detail in the opinion of the Administrative Law Judge (ALJ) (Pet. App. 37a-64a). The case arises from actions taken by petitioner, Marriott In-Flite Services, during negotiations with the Union, International Association of Machinists and Aerospace Workers, from October 1978 to October 1979.

The Union was certified as the employees' exclusive bargaining representative on September 27, 1978. On October 20, petitioner and the Union began bargaining (Pet. App. 37a). The parties met repeatedly through May 17, 1979, after which petitioner declared that an impasse had been reached and unilaterally implemented certain changes in terms and conditions of employment (Pet. App. 50a-51a). The parties resumed meetings in July, and continued to meet until October 9, at which time petitioner initiated a decertification campaign among the employees (Pet. App. 57a-63a). On October 12, a decertification petition was filed with the Board, and petitioner ceased to bargain with the

Union on the ground that it had a good faith doubt concerning the Union's majority status (Pet. App. 63a-64a).

2. The Board, upholding the ALJ's decision,[1] found that petitioner violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by failing to bargain in good faith with the Union, by making unilateral changes in the employees' terms and conditions of employment, by originating and sponsoring circulation of decertification petitions, and by withdrawing recognition from the Union (Pet. App. 30a-32a).[2]

The ALJ found that "after May 17, 1979, [petitioner] failed to bargain in good faith and instead bargained with a determination not to reach an agreement and to undermine and destroy the Union as bargaining representative" (Pet. App. 66a). In so finding, the ALJ relied on petitioner's unilateral changes in meal and overtime policies (Pet. App. 70a), its "negative and unyielding position" in rejecting the Union's union security and dues checkoff proposals (Pet. App. 78a), and its "organized effort to promote decertification of the Union" (*ibid.*).

The ALJ rejected petitioner's contention that it was entitled to make the unilateral changes because bargaining

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[1]The Board adopted the ALJ's recommended order, with minor modifications not pertinent here (Pet. App. 31a-32a).

[2]In two subsequent proceedings, which were consolidated with the original proceeding in the court of appeals, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally granting an 11% wage increase and an additional holiday to employees on March 29, 1980 (Pet. App. 21a, 23a), and by granting a 10% wage increase and an additional sick day to employees on March 28, 1981, without prior notice to the Union and without giving the Union an opportunity to bargain about these changes (Pet. App. 9a, 11a). These findings rest on the Board's conclusion in the original proceeding that petitioner unlawfully withdrew recognition from the Union (Pet. App. 10a, 22a). Petitioner raises no independent issue concerning them (Pet. 2).

negotiations had reached impasse on May 17, 1979. The ALJ noted that "when negotiations broke off on May 17, there were about 26 open items. Many of them had not even been seriously discussed" (Pet. App. 71a.) He added that when negotiations were resumed many issues were resolved, and that, although petitioner "indicated that its pending proposal was its final offer, such intransigence by one party does not indicate an impasse" (*ibid.*).

The ALJ also concluded that, to the extent an impasse did exist, it was caused by petitioner's failure to bargain in good faith, and thus could not be relied upon as a defense to unilateral changes (Pet. App. 72a). The ALJ explained that petitioner's "intransigence in characterizing its May 17 bargaining position as a 'final offer,' coupled with its direct contacts with employees in an attempt to sell implementation of the overtime proposal is evidence that it was not at this point bargaining in good faith" (*ibid.*).

The Board's orders require petitioner to cease and desist from the unfair labor practices found, and from interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. 157) in any like or related manner. The Board's orders require petitioner, upon request, to bargain in good faith with the Union and, if an understanding is reached, to embody it in a signed agreement, and to post appropriate notices (Pet. App. 31a-34a, 86a-89a).

3. The court of appeals, in an unpublished order, upheld the Board's findings and enforced its orders (Pet. App. 3a-5a). The court found that the record contained "substantial and, perhaps, overwhelming evidence to support the Board's findings" (Pet. App. 4a).

ARGUMENT

In a decision described by the court of appeals as "detailed and careful" (Pet. App. 4a), the ALJ concluded

that petitioner ceased to bargain with the Union in good faith before the collective bargaining process had been exhausted, in violation of Section 8(a)(5) and (1) of the Act, and that it further violated Section 8(a)(5) and (1) by making unilateral changes in the employees' terms and conditions of employment and by originating, instigating, encouraging, assisting, and sponsoring the circulation of decertifcation petitions. The Board upheld the ALJ's decision, with minor modifications not at issue here, and the court of appeals affirmed. The Board's decision is amply supported by substantial evidence. Further review by this Court is unwarranted because the application of the "good faith" standard in the decision below depends solely upon the particular facts of this case and raises no significant unresolved issue of law. *NLRB* v. *American National Ins. Co.*, 343 U.S. 395, 409-410 (1952).

1. Petitioner contends that its course of conduct after May 17, including its unilateral implementation of improvements in compensation for overtime work and elimination of charges for employees' meals, was lawful because an "impasse" in collective bargaining had been reached on May 17 (Pet. 15-19). Substantial evidence supports the ALJ's finding that no genuine impasse had been reached at that stage in the negotiations.

As noted in the ALJ's opinion, as of May 17 neither party had yet made a wage offer, and few, if any, economic proposals had been made and discussed to resolution (Pet. App. 70a). Just six weeks earlier, petitioner and the Union had expressly agreed that a wage increase beyond that put into effect on April 1 would be discussed; in the interim period petitioner's chief negotiator remained away from negotiations for about four weeks (*ibid.*). On May 17, petitioner made an offer — characterized as a "final offer" — to the Union, which the Union agreed to consider. Petitioner nonetheless made unilateral changes in benefits on May 31,

before waiting to hear the Union's response to its May 17 offer (Pet. App. 73a). A further indication that no genuine impasse had been reached by May 17 is that a federal mediator had entered the negotiations only on May 8. As the ALJ pointed out, "It would be incongruous to find an impasse based on such a short period of time after the intervention of a mediator" (Pet. App. 72a).

Indeed, the ALJ identified signs that petitioner had ceased to bargain in good faith even prior to May 17, the date of the alleged impasse. In early May, petitioner circulated notices to the employees concerning implementation of recent wage and benefit changes, stating that the Union had not objected to their implementation. In fact, the Union had objected to the implementation of one key item, an improvement in overtime compensation (Pet. App. 72a). The ALJ also found "intransigence" in petitioner's insistence that its May 17 offer was final (*ibid.*).

Subsequent developments bear out that no genuine impasse was reached as of May 17. Talks resumed on July 10, at which time petitioner informed the Union by letter that it would make economic proposals in the future (Pet. App. 71a). The parties met on eight additional occasions (*ibid.*), and the Union agreed to several significant additional concessions.

Taken as a whole, these facts constitute substantial evidence for the Board's findings. In addition, the ALJ correctly invoked the well-established principle that "there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith." *Industrial Union of Marine & Shipbuilding Workers* v. *NLRB*, 320 F.2d 615, 621 (3d Cir. 1963) (footnote omitted), cert. denied, 375 U.S. 984 (1964); accord, *New York Printing Pressmen & Offset Workers* v. *NLRB*,

538 F.2d 496, 501 (2d Cir. 1976). As the ALJ found (Pet. App. 72a-73a), even if an impasse could be said to have occurred, it was caused by petitioner's intransigence and attempts to undermine the Union by direct contacts with the employees.

Petitioner's conduct during October further substantiates the Board's finding that petitioner violated its obligation to bargain in good faith. The ALJ found that on October 9, even as its negotiators were sitting at the bargaining table with the Union, petitioner was briefing its managers on how to conduct employee meetings to decertify the Union. During the October 9 bargaining session, the Union offered to make significant concessions — to withdraw its union security proposal, to abandon its proposal for dues checkoff, to agree to all of petitioner's remaining proposals, and to allow petitioner to set the next annual wage increase at its discretion (Pet. App. 5a-55a, 81a) — yet petitioner declined to close an agreement. Instead, petitioner scheduled a new meeting for October 15. It was not to occur. On October 10, 11, and 12, petitioner conducted group meetings with the employees, distributed decertification petitions, and "actively and aggressively" promoted decertification (Pet. App. 58a-62a, 80a-81a). The ALJ concluded that these steps were "part and parcel of [petitioner's] final effort to destroy the Union" (Pet. App. 81a). He found that as late as October 9, agreement was still possible in light of the Union's concessions, but that petitioner's "duplicitous" scheduling of an additional session at the same time that it was proceeding with a strategy of decertification showed lack of a good faith effort to achieve an agreement (*ibid.*).

2. Petitioner contends (Pet. 8-15) that the Board's conclusion that it failed to bargain in good faith was improperly based on its refusal to agree to the Union's union security

and dues checkoff proposals, in contravention of the principles established in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).[3] There is no merit to that contention.

As already discussed, the ALJ relied on the totality of petitioner's conduct, including its unilateral changes in employee benefits, direct dealing with employees, and sponsorship of the decertification effort, as well as on petitioner's intransigence on the union security and checkoff issues. Petitioner's course of conduct before and after May 17 amply supports the ALJ's finding of unfair labor practices; petitioner's intransigence on the issues of union security and dues checkoff were treated by the ALJ solely as "further evidence" of petitioner's failure to bargain in good faith (Pet. App. 76a). Indeed, the ALJ was careful to stress that he viewed petitioner's posture in rejecting the Union's union security and dues checkoff proposals "in the context of other evidence" of petitioner's failure to bargain in good faith (Pet. App. 74a, 76a).

Moreover, contrary to petitioner's arguments (Pet. 6-15), the ALJ did not treat petitioner's mere negotiating position as indicative of a refusal to bargain in good faith. He did not, in petitioner's words, "require[] Petitioner to concede to the [Union's] demands of 'union security and dues checkoff' or be found guilty of having violated Sections 8(a)(1) and (5) of the Act" (Pet. 7-8). Rather, the ALJ found on the basis of petitioner's own statements at the bargaining table that its opposition to a Union security agreement and dues checkoff plan was based on its belief that the Union did not have "majority status or sufficient strength" (Pet. App. 76a), despite the Union's entitlement to a presumption of

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[3]Petitioner also cites *Teamsters Local No. 357* v. *NLRB*, 365 U.S. 667 (1961); *NLRB* v. *American National Ins. Co.*, 343 U.S. 395 (1952); and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Pet. 3).

majority support by virtue of recent Board certification.[4] As the ALJ pointed out, "[a]n employer who approaches negotiations with an eye towards questioning a certified union's representative status is surely not bargaining in good faith" (*ibid.*). An employer is free to reject any particular proposal at the bargaining table, but it is not free to decide for itself whether to treat the Union as the legitimate bargaining agent for its employees. *H.K. Porter, supra,* 397 U.S. at 102, 108 n.6.

If petitioner contends that the Board cannot take into account the content of a party's bargaining proposals when assessing good faith, it is mistaken. This Court has made clear that that determination is made by "drawing inferences from the conduct of the parties as a whole." *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 498 (1960). In *American National Ins. Co., supra,* the Court acknowledged that, while insistence on a management functions clause was not a per se violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).

Petitioner's reliance (Pet. 10-12) on *H.K. Porter, supra,* is misplaced. There the Court did not question the validity of the Board's finding that the employer had failed to bargain in good faith concerning a dues checkoff proposal; it simply held that the Board's remedial authority does not extend to ordering employers to agree to specific union bargaining

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[4] A union's majority support is presumed to continue following certification and, absent unusual circumstances, the presumption is irrebutable for one year. Thereafter, it may be rebutted by a showing of actual minority status or of a good faith reasonable doubt by the employer of the Union's continued majority support at the time of the refusal to bargain. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB,* 348 U.S. 96, 98-99 (1954).

demands. Accordingly, the Court invalidated a Board order which specifically required the employer to grant the Union a checkoff provision it had not agreed to in collective bargaining. The Board's order here does not require petitioner to agree to any particular contract provision; it merely requires petitioner to bargain in good faith about terms and conditions of employment (Pet. App. 31a-32a, 86a-89a).

Accordingly, the only issue raised by petitioner's contention is whether substantial evidence supports the Board's finding that petitioner was seeking to avoid reaching any collective bargaining agreement with the Union at all.[5] That evidentiary issue does not warrant further review by this Court. *NLRB* v. *American National Ins. Co., supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

3. Petitioner's final contention, that its participation in the decertification effort was nothing more than the provision of factual information to the employees regarding their rights (Pet. 20-21), also raises only evidentiary issues.

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[5]The court of appeals cases relied on by petitioner (Pet. 13-15) merely reflect application to different factual circumstances of the same legal standards applied by the court of appeals here. In *Chevron Oil Co.* v. *NLRB*, 442 F.2d 1067, 1070-1074 (5th Cir. 1971) (Pet. 13), the court found that the evidence did not support the Board's findings that the company had no intention to deal in good faith with the Union or was dilatory in scheduling meetings and supplying information. Similarly, in *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F.2d 1298, 1326 (1978), adopted in relevant part en banc, 598 F.2d 896 (5th Cir. 1979) (Pet. 13), *M.R. & R. Trucking Co.* v. *NLRB*, 434 F.2d 689, 695 (5th Cir. 1970) (Pet. 14), and *Pease Co.* v. *NLRB*, 666 F.2d 1044, 1049-1050 (6th Cir. 1981), cert. denied, 456 U.S. 974 (1982) (Pet. 14), the court found that the Board's bad faith finding was based on nothing more than "hard bargaining." In *Pittsburgh-Des Moines Corp.* v. *NLRB*, 663 F.2d 956, 960 (9th Cir. 1981) (Pet. 15), the court found that the employer's attempt to renegotiate a contract offer that initially had been rejected by the Union did not, in the circumstances, support an inference that the employer intended that no agreement be reached.

The ALJ concluded (Pet. App. 78a-83a) that petitioner exceeded the bounds of permissible employer conduct. He based his conclusions on specific occurrences amounting to a campaign "to aggressively and affirmatively sell decertification to its employees" (Pet. App. 80a). The ALJ's findings amply support the Board's conclusions.

The ALJ found, and petitioner does not deny, that petitioner's supervisory officers held meetings with the employees during work time,[6] distributing not just booklets explaining the decertification process, but also forms suggesting the actual language of the petitions[7] (Pet. App. 79a). The ALJ found that "coercion was suggested" in at least one of petitioner's meetings with the employees (Pet. App. 80a). A supervisor questioned why the employees supported the Union, told them that the Union had accomplished nothing, and "insisted that [the petition] had to be signed" (*ibid.*). Petitioner did not, therefore, merely dispense factual information to the employees, but "planted the idea of decertification in the minds of employees, gave them the specific language and forms to effectuate decertification, and, most importantly, led employees, especially the Spanish speaking employees, to believe that [petitioner] was behind and sponsoring the decertification effort" (Pet. App. 80a-81a). Such evidence is the basis for a finding of violation of the Act. See *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26, 29

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[6]The ALJ found that, prior to petitioner's decertification efforts, only about six or seven employees had expressed dissatisfaction with the Union to petitioner (Pet. App. 80a).

[7]Further doubt is cast upon petitioner's interest in the neutral provision of information by the fact that the decertification booklet was made available only in English, while the draft petition was translated. Some 60% of the employees were predominantly Spanish speaking (Pet. App. 79a).

(2d Cir. 1967); *NLRB* v. *Movie Star, Inc.*, 361 F.2d 346, 348-349 (5th Cir. 1966); *Rogers Mfg. Co.*, 228 N.L.R.B. 882, 886-887 (1977).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioner states (Pet. 20) that it refrained from giving the employees any information about decertification until after the certification year had expired on September 27, 1979. As the cited decisions show, however, it is unlawful for an employer actively to promote decertification among the employees, irrespective of whether the one year period of presumptive majority has lapsed.